EMPLOYER STATUS DETERMINATION
Eagle Leaf Transload, LLC

This is the determination of the Railroad Retirement Board concerning the status of Eagle Leaf Transload, LLC (ELT) as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351, et seq.) (RUIA).

According to information submitted in letters dated November 20, 2006, and June 11, 2007, from Ms. Lori L. Barnes, President of Claremont Concord Railroad Corp. (CCRR) (B.A. No. 4113) CCRR moves freight cars to and from their interchange for the shippers and consignees on their line. CCRR also does locomotive repair work. ELT was formed in 2001 to provide transload services for Lafarge North America (Lafarge) with whom ELT has a contract. Lafarge was seeking a rail served location in the Lebanon/White River Junction, and an operator to transload cement for a major customer of theirs. CCRR does not provide transload services; it does not have the manpower and could not afford to add it. ELT was created to perform the needed transload services for Lafarge. In 2002, American Rock Salt leased an empty salt shed from the CCRR and entered into a contract with ELT for ELT to operate that facility for American Rock Salt.

The owners of CCRR are Ms. Barnes, Steven LaValley and Jeffrey Albright. ELT is owned by CCRR, Ms. Barnes and Mr. LaValley. Ms. Barnes, the President of CCRR, is also the bookkeeper for both companies.

There is no contract between CCRR and ELT. ELT has a contract with Lafarge, as stated above, to transfer cement from Lafarge's railcars to the trucks of Lafarge's customers, Carroll Concrete and Henniker Concrete. ELT has a contract with American Rock Salt to transfer road slat from American Rock Salt's railcars to trucks for delivery to American Rock Salt customers. ELT also assists American Rock Salt in marketing road salt to area towns. ELT also purchases road salt from American Rock Salt and sells it to local businesses and contractors. In addition, ELT has provided truck-to-truck transfer of various commodities including steel and lumber. ELT provides no services to CCRR. ELT does notify CCRR when the railcars of ELT customers are ready for switching.

Section 1(a) (1) of the Railroad Retirement Act (45 U.S.C. § 231(a) (1)), insofar as relevant here, defines a covered employer as:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;

> (ii) any company which is directly or indirectly owned or controlled by or under common control with, one or
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> (iii) more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

ELT is clearly not a carrier by rail. By reason of its ownership by CCRR, Ms. Barnes, and Mr. LaValley, ELT is owned by and is under common control with a rail carrier employer. Furthermore, as stated above, ELT shares other owners with CCRR. We therefore find that the available evidence indicates that ELT is owned by a covered rail carrier employer and controlled by officers or directors who control a railroad.

With respect to the question of whether ELT is performing a service in connection with the transportation of passengers or property by railroad, we have previously found the business of loading and unloading freight and cargo from freight cars to be service in connection with the transportation of passengers or property by railroad. *See,* Calumet Transload and Railroad, LLC (B.C.D. 05-19) and Logistics Management Systems, Inc. (B.C.D. 03-62). Also see Railroad Retirement Board v. Duquesne Warehouse Co., 149 F.2d 507 (D.C.Cir. 1945), aff'd 326 U.S. 446, 90 L.Ed. 192, 66 S.Ct. 238 (1946), in which the Court of Appeals held that a warehouse corporation owned by a railroad and engaged in loading and unloading railroad cars and other handling of property transported by railroad, and in other activities which enabled the railroad to perform its rail transportation more successfully, was performing "services in connection with" the transportation of property by railroad and was therefore an employer under the Railroad Unemployment Insurance Act.

However, the instant case does not fall within the rationale set out in Duquesne Warehouse Co., above. None of ELT's revenue is derived from performing transloading services for its affiliated railroad. In fact, there is no evidence that ELT performs services for any rail carrier. Rather, ELT performs services for its own (non-carrier) clients and customers of those clients. Accordingly, we find it is not performing service in connection with the transportation of passengers or

property by railroad. This conclusion is consistent with prior Board decisions. See, e.g., B.C.D. 97-46, RailTex Logistic Company, Inc. ("RLC does not perform service for any of the railroads owned by its parent company"); B.C.D. 01-13, KBN, Inc. (". . . the evidence of record is that KBN does not provide any services to its subsidiary railroads"); and B.C.D. 02-11, Transworks Company ("Transworks Company . . . provides no services to its rail affiliate, although it does provide services to unaffiliated railroads"). See also, B.C.D. 93-79, In Re VMV Enterprises Incorporated.

Therefore, based on the information set forth above, it is the determination of the Railroad Retirement Board that Eagle Leaf Transload LLC is not an employer under the RRA and RUIA.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.
(Concurring opinion attached)

Jerome F. Kever

CONCURRING OPINION OF V. M. SPEAKMAN, JR.,
LABOR MEMBER

EAGLE LEAF TRANSLOAD, LLC

I concur with the result in this case, but feel compelled to comment on the scope of the "service in connection with" clause as it relates to loading and unloading. Section 1(a)(1)(ii) of the Railroad Retirement Act and sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act provide that any company controlled or under common control with a carrier is covered under these statutes, if it performs any service (trucking service and casual service excepted) in connection with the transportation of passengers and property by railroad.

The Majority correctly recognizes that in light of the **Duquense** case, the "service in connection with clause" at a minimum encompasses transportation services within the meaning of the Interstate Commerce Act. Services related to the transfer in transit or the interchange of property in transit by rail are clearly transportation services within the meaning of the Interstate Commerce Act. See 49 U.S.C. & 10102(9)(B). The Majority, however, finds that **Duquense** does not apply because none of ELT's revenue is derived from performing transloading services for its affiliated railroad.

I think this is too simplistic an approach. After all if the services performed by ELT are transportation services within the meaning of the Interstate Commerce Act, then why should the fact that its services are not performed for its affiliate carrier make any difference. Certainly, there is nothing in the text of section 1(a)(1)(ii) which suggests such a result; nor in Board regulation . See 20 CFR 202.7 In fact *Livinigston Rebuild Center v. Railroad Retirement Board, 970 F. 2d. 295 (7th Cir. 1992)* suggests that if the services are in connection with railroad transportation, it does not make any difference for whom the services are performed. Cf. *Interstate Quality Services, Inc. v. Railroad Retirement Board,* 83 F. 3d 1463 (D. C. Cir. 1996). Would the loading and unloading of freight by Interstate be any less of a service in connection with transportation, if it were performed for other carriers rather than it's parent carrier?

The better approach is the one suggested in the seminal opinion L-38-650, which provides that a decision on whether an activity is a "service in connection with railroad transportation" depends not only on the nature of the service, but also the context in which the service is performed. Specifically, what is the history or origin of the operations in question, for whose benefit are the services performed, and who is the customer of the services?

ELT, a subsidiary of Claremont Concord Railroad Corp. (CCRR), essentially a switching operation, was formed to satisfy the need of two shippers, Lafarge and American Rock Salt. These companies contract with ELT to transfer cement and salt from their rail cars to the trucks of their customers. ELT has no contract with CCRR or any carrier covered by our statutes. The services performed by ELT are not for the benefit of any carrier operation and do not support any carrier business. Its services are not in any way directly related to a carrier's performance of its common carrier obligation. Thus, using L-38-650 as a guide, I would conclude that ELT is not performing services in connection with railroad transportation.

Original signed by:

V. M. Speakman, Jr.